

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, et al.)	
)	
Plaintiffs,)	
)	
v.)	05-CV-0329 GKF-SAJ
)	
TYSON FOODS, INC., et al.,)	
)	
Defendants.)	
)	

**THE CARGILL DEFENDANTS’ REPLY TO PLAINTIFFS’ RESPONSE
TO MOTION FOR SANCTIONS**

Cargill, Inc. and Cargill Turkey Production, LLC (the “Cargill Defendants”) submit the following Reply Brief in support of their Rule 37(b) Motion for Sanctions and Brief in Support (Dkt. No. 1252). Plaintiffs’ response to the Cargill Defendants Motion for Sanctions (Dkt. No. 1272) in effect asks the Court to excuse Plaintiffs from their discovery obligations and to reconsider this Court’s unambiguous order of May 17, 2007 compelling discovery responses (Dkt. No. 1150). The Court should reject Plaintiffs’ arguments and grant the motion.

ARGUMENT

A. Plaintiffs’ Late Concession that They Lack Any Direct Evidence Against the Cargill Defendants Does Not Shield Plaintiffs from Sanctions.

In their response to the Cargill Defendants’ motion for sanctions, Plaintiffs finally admit for the first time that they have no direct evidence that (1) the Cargill Defendants’ “poultry waste disposal practices are not, and have not been, undertaken in conformity with federal and state laws and regulations” as alleged in Paragraph 56 of their Complaint, or (2) the conduct and acts of any Cargill entity constitute a nuisance under Oklahoma law as alleged in Count 4 of the Complaint. (*See* Pls.’ Resp. at 5, 8, Docket No. 1272.) Plaintiffs characterize this new

concession as somehow inherent in their supplemental responses to Cargill Interrogatories 9 and 13. Docket No. 1272-3. However, as explained in the Cargill Defendants' motion, Plaintiffs' supplementation circularly claimed that "[t]o the extent that the State will prove that the Cargill Defendants have violated these statutes and regulations [or created a nuisance] through **other direct** evidence, it will supplement its response to disclose that **other direct** evidence" (Docket No. 1189-11 at 11-13, 17-20 (emphasis added)), while simultaneously failing to provide **any** direct evidence.

Despite this Court's mandate that Plaintiffs specifically state in their supplemental responses to Cargill Interrogatories 9 and 13 if they have no direct evidence and are relying solely on circumstantial evidence, Plaintiffs refused to make such a plain statement until the Cargill Defendants moved for sanctions. A party may not escape sanctions by attempting to comply with a discovery order only after the opposing party has sought sanctions. See, e.g., Fed. R. Civ. P. 37(a)(4)(A) (mandating award of attorneys' fees and expenses unless unjust where opposing party provides disclosure after motion to compel is filed). Particularly under the circumstances here, where the Cargill Defendants have not only met and conferred repeatedly on the issue but the Court has already issued an Order requiring a full and complete response, sanctions are warranted.

B. Plaintiffs' Insufficient Supplementation of "Circumstantial" Evidence Warrants Sanctions.

Looking beyond the now-admitted absence of any direct evidence supporting Plaintiffs' claims against the Cargill Defendants, Plaintiffs have also failed to identify any circumstantial evidence supporting those claims. Unquestionably, as Plaintiffs point out, many legal theories may be proved by circumstantial evidence as well as by direct evidence. Even then, however,

the party must actually present such circumstantial evidence, and cannot rest on mere theories. “Indirect or circumstantial evidence is proof of a chain of facts and circumstances indicating the existence or nonexistence of a fact.” 3 Fed. Jury Prac. & Instr. § 104.05 (5th ed.) The Federal Jury Practice Guide favorably notes the Tenth Circuit’s approval of a jury instruction defining circumstantial evidence as “the proof of certain facts and circumstances in a given case from which a jury may, under certain conditions, infer other connecting facts which usually and reasonably follow according to the common experiences of mankind.” Id.; Wilkins v. Hogan, 425 F.2d 1022, 1025 n.1 (10th Cir. 1970).

Here, neither Plaintiffs’ original answers to Cargill Interrogatories Nos. 9 and 13 nor their supplementation identifies any “proof of certain facts and circumstances” or any “proof” of a particular chain of facts. Rather, Plaintiffs’ answers and supplementations describe Plaintiffs’ *theories*, what Plaintiffs *hope* their experts might be able to prove at trial, but provide neither supporting references nor any actual evidence of a factual connection between their claim and the Cargill Defendants. (See Docket Nos. 1189 and 1272-3 at 11-13, 17-20.)

Specifically, in their Response to the Motion for Sanctions, Plaintiffs suggest that they have “explained that [their] claim that these wastes pollute the ground and surface waters is based on a circumstantial case which rests upon the testimony of experts who will present the case through at least eight separate means.” (Docket No. 1272 at 4.) This is not an identification of evidence, as the Cargill Defendants requested and the Court ordered. It is merely a promise of evidence sometime in the future. Indeed, one of those “eight separate means” by which Plaintiffs’ experts will reportedly prove their circumstantial case expressly “rests upon testimony of experts who will present the case through ... showing that poultry waste is a major contributor of pollutants in the IRW by circumstantial evidence.” (Docket No. 1272-3 at 12-13 (“means

(H)).) Likewise, Plaintiffs generally refer the Cargill Defendants to all of the documents that Plaintiffs have produced “associated with the State’s sampling scheme.” (Docket No. 1272-3 at 14.) Such a response is far too vague to satisfy Rule 33(d), let alone this Court’s specific command that Plaintiffs “describe the circumstantial evidence with as much particularity as possible.” (Dkt. No. 1150, Order of May 17, 2007 at 8, 9.)

Nor does Plaintiffs’ mechanical listing of various articles concerning water quality issues (e.g., Docket No. 1272-3 at 2-5, 7-9, 10-11) substitute for actual evidence tying the Cargill Defendants to the alleged harm. The articles themselves are essentially meaningless as evidence outside the context of expert opinion, see Fed. R. Evid. 803(18), which Plaintiffs of course have not yet disclosed to Defendants. Moreover, as far as the Cargill Defendants can determine, none of the listed articles says anything specific as about the acts or omissions of either the Cargill Defendants or the growers with whom they contract. As with Plaintiffs’ other responses, these articles offer nothing more than the promise of future evidence tying Plaintiffs’ claims to the Cargill Defendants.

Aspirational goals do not suffice as evidence, circumstantial or otherwise. Without pointing to “proof of a chain of facts and circumstances,” Plaintiffs have identified no circumstantial evidence of any alleged statutory violations committed or nuisances created and maintained by the Cargill Defendants. Yet Plaintiffs refuse to plainly admit this failure. In effect, Plaintiffs’ Response asks the Court to modify its unambiguous Order to excuse them from identifying the circumstantial evidence on which they say they will rely to prove the Cargill Defendants’ alleged conduct. Plaintiffs want the Court’s blessing to withhold any and all evidence supporting their claims against the Cargill Defendants until the time of expert disclosures. Plaintiffs’ dilatory position is inconsistent with the Rules, the present Scheduling

Order, and this Court's Order of May 17, 2007 (Docket No. 1150). Plaintiffs' refusal to obey the Court's Order and provide the Cargill Defendants with even the most basic factual information about Plaintiffs' broad and far-reaching claims has prejudiced the Cargill Defendants and severely delayed their discovery efforts. The Court should force Plaintiffs to live up to their discovery obligations.

B. PLAINTIFFS' FAILURE TO SUPPLEMENT THEIR RULE 33(D) RESPONSES VIOLATES THE COURT'S ORDER.

Plaintiffs' "supplementation" of their original Rule 33(d) responses to various interrogatories also fails to comply with the Court's Order. As the Court will recall, on the eve of the hearing on Cargill's previous motion to compel on these issues, Plaintiffs agreed to supplement their responses to Cargill Interrogatories Nos. 3 and 16 and Cargill Turkey Production Interrogatories 6, 13, and 15, all of which had been answered with Rule 33(d) references to documents rather than with actual information. The Court memorialized this agreement in its May 17, 2007 Order, noting that Plaintiffs had agreed "the responses would be supplemented on June 1, 2007 under the same standards as set forth in the Court's Orders dated February 26, 2007 and April 4, 2007 [Dkt. #'s 1061, 1118], referenced by the parties as the 'Tyson rule.'" Docket No. 1150 at 2.

Rather than comply with this agreement, Plaintiffs failed to provide any actual supplementation whatever. On the contrary, far from providing *more* information in their supplemental responses, Plaintiffs withdrew their previous 33(d) designations and provided nothing in their place, other than a vague promise to perhaps supplement further sometime in the future. Although Plaintiffs were entitled to withdraw their vague Rule 33(d) designations, they must provide a narrative response in lieu of the designation. Here, however, Plaintiffs did

neither. According to their original responses, executed under oath, Plaintiffs have information and documents responsive to these interrogatories. In choosing to retract information instead of supplementing with information Plaintiffs have already sworn that they have, Plaintiffs violated the letter and spirit of this Court's Orders and should be sanctioned.

C. THIS COURT SHOULD SANCTION PLAINTIFFS.

As described in the opening brief, under Rule 27 and controlling case law, this Court enjoys broad discretion in fashioning appropriate sanctions, and may impose any "just" sanction for failure to abide by a discovery order. Fed. R. Civ. P. 37(b)(2); Lewis v. Wal-Mart Stores, Inc., Civ. No. 02-0944 (CVE/FHM), 2006 U.S. Dist. LEXIS 47014, at *9-10 (N.D. Okla. July 11, 2006) (citing Roadway Express, Inc. v. Piper, 447 U.S. 752, 765 (1980); Jones v. Thompson, 996 F.2d 261, 264 (10th Cir. 1993)). This Court thus enjoys broad discretion in fashioning discovery sanctions, despite Plaintiffs' intimations to the contrary. The Cargill Defendants submit that, considering the purposes to be served by the sanction, the alternatives proposed in the instant motion is both fair and measured. Plaintiffs have opted to play word games rather than simply abide by the parties' agreement and this Court's Order. The Court should give Plaintiffs a choice: either answer the questions, or face the consequences.

CONCLUSION

Despite Plaintiffs' exaggeration, this is not a "motion to win the case" unless Plaintiffs want it to be. The Cargill Defendants ask only that the Court order that if Plaintiffs do not reveal the evidence they intend to use to prove their case against the Cargill Defendants, Plaintiffs may not use that evidence at trial. This is not an extraordinary remedy; on the contrary, it is one of the fundamental tenets of the federal discovery rules. The Cargill Defendants urge the Court to grant their motion.

Respectfully submitted,

RHODES, HIERONYMUS, JONES,
TUCKER & GABLE, PLLC

BY: s/ John H. Tucker

JOHN H. TUCKER, OBA #9110
COLIN H. TUCKER, OBA #16325
THERESA NOBLE HILL, OBA #19119
100 W. Fifth Street, Suite 400 (74103-4287)
P.O. Box 21100
Tulsa, Oklahoma 74121-1100
Telephone: 918/582-1173
Facsimile: 918/592-3390

And

DELMAR R. EHRICH
BRUCE JONES
DARA MANN
KRISANN C. KLEIBACKER LEE
FAEGRE & BENSON LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, Minnesota 55402
Telephone: 612/766-7000
Facsimile: 612/766-1600

ATTORNEYS FOR CARGILL, INC. AND CARGILL TURKEY
PRODUCTION LLC

CERTIFICATE OF SERVICE

I certify that on the 24th day of September, 2007, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

W. A. Drew Edmondson, Attorney General
Kelly Hunter Burch, Assistant Attorney General
J. Trevor Hammons, Assistant Attorney General
Robert D. Singletary
Daniel Lennington, Assistant Attorney General

drew_edmondson@oag.state.ok.us
kelly_burch@oag.state.ok.us
trevor_hammons@oag.state.ok.us
Robert_singletary@oag.state.ok.us
Daniel.lennington@oag.ok.gov

Douglas Allen Wilson
Melvin David Riggs
Richard T. Garren
Sharon K. Weaver
Riggs Abney Neal Turpen Orbison & Lewis

doug_wilson@riggsabney.com
driggs@riggsabney.com
rgarren@riggsabney.com
sweaver@riggsabney.com

Robert Allen Nance
Dorothy Sharon Gentry
Riggs Abney

rnance@riggsabney.com
sgentry@riggsabney.com

J. Randall Miller
David P. Page
Louis W. Bullock
Miller Keffer & Bullock

rmiller@mkblaw.net
dpage@mkblaw.net
lbullock@mkblaw.net

William H. Narwold
Elizabeth C. Ward
Frederick C. Baker
Lee M. Heath
Motley Rice

bnarwold@motleyrice.com
lward@motleyrice.com
fbaker@motleyrice.com
lheath@motleyrice.com

COUNSEL FOR PLAINTIFFS

Stephen L. Jantzen
Patrick M. Ryan
Paula M. Buchwald
Ryan, Whaley & Coldiron, P.C.

sjantzen@ryanwhaley.com
pryan@ryanwhaley.com
pbuchwald@ryanwhaley.com

Mark D. Hopson
Jay Thomas Jorgensen
Timothy K. Webster
Sidley Austin LLP

mhopson@sidley.com
jjorgensen@sidley.com
twebster@sidley.com

Robert W. George
Michael R. Bond
Kutack Rock LLP

robert.george@kutackrock.com
michael.bond@kutackrock.com

**COUNSEL FOR TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC.;
AND COBB-VANTRESS, INC.**

R. Thomas Lay
Kerr, Irvine, Rhodes & Ables

rtl@kiralaw.com

Jennifer S. Griffin
Lathrop & Gage, L.C.

jgriffin@lathropgage.com

COUNSEL FOR WILLOW BROOK FOODS, INC.

Robert P. Redemann
Lawrence W. Zeringue
David C. Senger
Perrine, McGivern, Redemann, Reid, Berry & Taylor, PLLC

rredemann@pmrlaw.net
lzingue@pmrlaw.net
dsenger@pmrlaw.net

Robert E. Sanders
E. Stephen Williams
Young Williams P.A.

rsanders@youngwilliams.com
steve.williams@youngwilliams.com

COUNSEL FOR CAL-MAINE FOODS, INC. AND CAL-MAINE FARMS, INC.

George W. Owens
Randall E. Rose
The Owens Law Firm, P.C.

gwo@owenslawfirmmpc.com
rer@owenslawfirmmpc.com

James M. Graves
Gary V. Weeks
Bassett Law Firm

jgraves@bassettlawfirm.com

COUNSEL FOR GEORGE'S INC. AND GEORGE'S FARMS, INC.

John R. Elrod
Vicki Bronson
Bruce W. Freeman
Conner & Winters, LLLP

jelrod@cwlaw.com
vbronson@cwlaw.com
bfreeman@cwlaw.com

COUNSEL FOR SIMMONS FOODS, INC.

A. Scott McDaniel
Nicole M. Longwell
Philip D. Hixon
Joyce, Paul & McDaniel, PC

smcdaniel@mhla-law.com
nlongwell@mhla-law.com
phixon@mhla-law.com

Sherry P. Bartley
Mitchell Williams Selig Gates & Woodyard
COUNSEL FOR PETERSON FARMS, INC.

sbartley@mws gw.com

Michael D. Graves
Dale Kenyon Williams, Jr.

mgraves@hallestill.com
kwilliams@hallestill.com

COUNSEL FOR CERTAIN POULTRY GROWERS

I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

C. Miles Tolbert
Secretary of the Environment
State of Oklahoma
3800 North Classen
Oklahoma City, OK 73118
COUNSEL FOR PLAINTIFFS

Thomas C. Green
Sidley Austin Brown & Wood LLP
1501 K Street NW
Washington, DC 20005
**COUNSEL FOR TYSON FOODS, INC., TYSON
POULTRY, INC., TYSON CHICKEN, INC.; AND
COBB-VANTRESS, INC.**

s/ John H. Tucker (OBA #9110)

fb.us.2305638.05